

Pre-Trial Issues

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TOPICS

- Mitigation Investigation
- Disclosure
- Intellectual Disability
- Chronis Hearing
- Pretrial Motions
- Settlement Discussions

**“IN MY
BEGINNING IS MY
END”**

T.S. Elliot, *Four Quartets*

THE MITIGATION INVESTIGATION

- All capital cases are unique and complex
- Most capital cases are filled with complex legal, factual and scientific issues
- But the mitigation investigation is the most complex issue
- And the mitigation investigation is the most time consuming
- And the mitigation investigation is the most likely to result in “reversal”

DEATH IS DIFFERENT

- The death penalty is “unique in both its severity and its finality, and the qualitative difference between a capital sentence and other penalties calls for a greater degree of reliability when it is imposed.” *Monge v. California*, 524 U.S. 721, 722 (1998).
- In every capital case, the sentencer “is required to consider the defendant’s background before imposing sentence.” *State v. Bocharski*, 200 Ariz. 50, 60, 22 P.3d 53, 53 (2001) (citing *Lockett v. Ohio*, 438 U.S. 586, 601-604 (1978)).
- An effort must be made by the defense to present the defendant to the jury as a human being. *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989).

WHAT IS MITIGATION?

Mitigation defined: Any information which could be used to demonstrate that cause for leniency exists when considering the appropriate sentence. Mitigation is not an excuse or justification for the offense, but allows jurors to consider factors, that in fairness and mercy, may reduce the defendant’s moral culpability.

MITIGATION

May include anything that explains factors in the defendant's life which may have influenced the ability to make appropriate decisions, caused skewed perceptions of right and wrong, or created an inability to make legitimate choices regarding the circumstances of the crime, to include any sympathetic or other aspect of the defendant's character, propensity, history, record, or circumstances of the offense.

MITIGATION AT TRIAL

- The trier of fact considers as mitigation any factors proffered by the defendant that are relevant to imposing a sentence less than death, including any aspect of the character or record of the defendant and any circumstances of the offense. *A.R.S. Sec. 13-751(G); Lockett v. Ohio, 438 U.S. 586 (1978)*
- The sentencing authority cannot refuse to consider relevant factors. *Eddings v. Oklahoma, 455 U.S. 104 (1982)*
- The relevancy standard for mitigating evidence is broadly defined:
 - "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *McKoy v. North Carolina, 494 U.S. 433 (1990)*.

ABA GUIDELINES

- The ABA Guidelines is designed to set forth a national standard of practice for the defense of capital cases in order to assure *high quality legal representation* for all persons facing the possible imposition of execution of a death sentence by any jurisdiction." ABA Guideline 1.1(A) [emphasis added].
- The ABA Guidelines control the actions of defense counsel here in Arizona, as they have been codified by Rule 6.8(b)(1)(iii).

ABA GUIDELINES

- Lead counsel in capital cases in Arizona “shall be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.”
- Due to “the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings, counsel must make ‘extraordinary efforts on behalf of the accused.’” Commentary to ABA Guideline 1.1

ABA GUIDELINES

- Penalty phase preparation requires an extensive and unparalleled investigation into the personal and family history of the accused. Commentary to ABA Guideline 10.7.
- This is because the sentencer in a capital case may not refuse to consider or be precluded from considering any relevant mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987). See also *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

ABA GUIDELINES

- The ABA Guidelines mandate that the investigation must cover, at minimum:
 - Medical history
 - Family and social history
 - Educational history
 - Military service
 - Employment and training history
 - Prior juvenile and adult correctional experience

Commentary to ABA Guideline 10.7

ABA GUIDELINES

The investigation:

- must be broad and detailed
- must attempt to create a complete life history of the accused
- requires contacting many sources of information
- This information is required “to construct a persuasive narrative, rather than to simply present a catalog of seemingly unrelated mitigating factors.” *Commentary to ABA Guideline 10.11.*

COMMON BARRIERS

People who kill:

- often suffer from a personality disorder or mental health issue
- often have substance abuse issues
- often have prior negative experiences with the justice system
- often have no interest in helping with the mitigation investigation
- often have family and friends who share these same disabilities and beliefs

COMMON BARRIERS

- A life time is a long time and contains many details to collect and understand
- Memory fades over time
- People adapt to their own life experience and that becomes their normal
- Adaptive behavior conceals disabilities
- Many traumatic events may be closely guarded family secrets
- It takes time to overcome these barriers

EXPERTS

- A complete social history is required “to construct a persuasive narrative, rather than to simply present a catalog of seemingly unrelated mitigating factors.” *Commentary* to ABA Guideline 10.11.
- A complete social history is required for most mental health experts to provide a meaningful opinion

DO IT RIGHT THE FIRST TIME

- The failure of defense counsel to conduct the exhaustive and complete investigation into all possible areas of mitigation as required by the *ABA Guidelines* violates the Eight Amendment, and constitutes ineffective assistance of counsel *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Wiggins v. Smith*, 539 U.S. 510 (2003).
- Death sentences from nearly every capital jurisdiction have been set aside due to counsel’s failure to investigate adequately the client’s background, character, or mental health

RULE 8 TIME LIMITS

- Capital cases 24 months from the date the State files the notice of intent to seek death
Rule 8.2 (a) (4)
- A continuance shall be granted only upon a showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice
Rule 8.5 (b)

STATE DISCLOSURE

- **Rule 15.1** provides general discovery rules and capital specific rules:
 - What must be disclosed**AND**
 - When it must be disclosed
- **Rule 15.1 (i)** additional requirements:
 - 60 days from arraignment to file notice of intent to seek death, and notice of aggravating circumstances
 - 30 days after filing of notice, penalty phase
 - 60 days after mitigation disclosure rebuttal disclosure

DEFENSE DISCLOSURE

- **Rule 15.2** provides general discovery rules and capital specific rules:
 - What must be disclosed**AND**
 - When it has to be disclosed
- **Rule 15.2 (h)** additional requirements:
 - 180 days from State's penalty phase disclosure required by **Rule 15.1 (i) (3)** mitigation disclosure is required
 - 60 days from the disclosure required by **Rule 15.1 (i) (3)** rebuttal disclosure is required

EXTENSION OF TIME

- **Rule 15.1 (i) (4)** allows the trial court to enlarge the time upon a showing of good cause or stipulation of counsel
- **Rule 15.2 (h) (2)** allows the trial court to enlarge the time upon a showing of good cause or stipulation of counsel

BUT WHAT ABOUT?

- How much detail is provided of the disclosed aggravation and the mitigation?
- Statements made by “penalty phase” witnesses
 - To mitigation specialists
 - To experts
 - To a lawyer
- Recordings or notes of the defendant’s statement made during the evaluation?
- Notes, testing results and raw data from the tests created by the expert?
- Prepared victim impact statements?

INTELLECTUAL DISABILITY

Atkins v. Virginia

536 U.S. 304 (2002)

- The United States Supreme Court held that it is a violation of the Eighth Amendment to execute individuals with “mental retardation”
- The prior case of *Penry v. Lynaugh*, 492 U.S. 302(1989) held that “mental retardation” should be a mitigating factor to be considered during sentencing, but not a bar to execution

A.R.S. § 13-753 (K) (3)

- “Intellectual disability” means a condition based on a mental deficit that involves significantly sub-average general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen
- The definition of mental retardation as defined in DSM-IV while similar in overall meaning, is not the same as the definition in the statute

State v. Grell, 212 Ariz. 516, 135 P.3d 696 (2006)

A.R.S. § 13-753

- A person who is found to have intellectual disability pursuant to this section *shall not be sentenced to death*
- Pre-screen: 13-753 (B) provides that when a notice of intent to seek death is filed, the court shall appoint an expert to determine the defendant's IQ
- The defendant may object
State ex rel. Thomas v. Duncan, 222 Ariz. 448, 216 P.3d 1194 (2009)

A.R.S. § 13-753

- An IQ higher than 75 precludes a finding that the defendant has an intellectual disability 13-753 (C)
- An IQ of 75 or less requires appointment of an additional expert(s)
 - May be nominated by the State
 - May be nominated by the defense
 - May be nominated by the court
 - May be several experts in total
- Practice effect: A practice effect is the outcome /performance change resulting from repeated testing
- Most tests require 6 months to 1 year between use

A.R.S. § 13-753 (F)

- If all IQ scores are above 70, the notice of intent to seek death shall not be dismissed on grounds that the defendant has an intellectual disability
- The Court shall take into account the margin of error for the test administered A.R.S. § 13-753 (K) (5)
- Can still present IQ as a mitigating circumstance at trial

ADJUSTMENTS TO THE IQ

- **Practice effect:** A practice effect is the outcome/performance change resulting from repeated testing
- **Flynn effect:** The average IQ score increases over time which requires a downward adjustment
- **Margin of error:** a plus or minus of 5 points is the accepted margin of error for most IQ tests

A.R.S. § 13-753 (G)

- The defendant has the burden to prove intellectual disability by clear and convincing evidence *State v. Grell, 212 Ariz 516, 135 P.3d 696 (2006)*
- An IQ score of 65 or lower creates a rebuttal presumption that defendant has intellectual disability
- An IQ score of 66 to 70 creates no presumption

BEYOND THE IQ SCORE

- “Adaptive behavior” means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant’s age and cultural group.” *A.R.S. § 13-753 (K) (1)*
- This language is not the same as the DSM-IV or the AAIDD definitions *Grell, Id.*
- An expert in “intellectual disabilities” means a psychologist or physician licensed pursuant to title 32, and with at least five years’ experience in the testing or testing assessment, evaluation and diagnosis of intellectual disabilities

DSM-IV

Considers concurrent deficits or impairments in present adaptive functioning in at least two of the following areas:

Communication
Self care
Home living
Social/interpersonal skills
Use of community resources

Self direction
Functional academic skills
Work
Leisure
Health and safety

THE BLUE BOOK

(was red, now Green)

- Intellectual disability “is characterized by significant limitation both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills.”
- “originates before age 18.”
- Must consider the 5 essential assumptions
Intellectual Disability: Definition, Classification and Systems of Support, American Association on Intellectual and Developmental Disabilities

THE 5 ESSENTIAL ASSUMPTIONS

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture
2. Valid assessments consider cultural and linguistic diversity as well as differences in communication, sensory, motor and behavioral factors
3. Within an individual, limitations often co-exist with strengths

THE 5 ESSENTIAL ASSUMPTIONS

4. An important purpose of describing limitations is to develop a profile of needed supports
5. With appropriate personalized support over a sustained period of time, the life functioning of the person with intellectual disability generally will improve

Intellectual Disability: Definition, Classification and Systems of Support, American Association on Intellectual and Developmental Disabilities

TIME LINE VS. DETAILS

- A.R.S. § 13-753 (D) allows 45 days to produce all relevant records
- Adaptive behavior requires detailed consideration to a life time
- The ability to perform some adaptive skills does not negate limitations in other areas
- Individuals with intellectual disability often try to hide the disability
- Individuals with intellectual disability may look like everyone else

CHRONIS HEARING

- The State alleges the aggravating circumstances it intends to prove
See A.R.S. §13-751 (F) and Rule 15.1(i)
- These aggravating circumstances do not need to be “presented” to the Grand Jury
McKaney v. Forman, 209 Ariz. 268, 100 P.3d 18 (2004)
- However a hearing can be requested to determine the “legal sufficiency of an alleged aggravating circumstance”

Chronis v. Steinle, 220 Ariz. 559 208 P.3d 210 (2009)

SCOPE OF THE HEARING

- A defendant may challenge the legal sufficiency of an alleged aggravating circumstance *Rule 13.5 (c)*
- Legal sufficiency includes allegations that are insufficient as a matter of law
- Legal sufficiency also includes a probable cause finding for any alleged aggravating circumstance

Chronis v. Steinle, 220 Ariz. 559 208 P.3d 210 (2009)

PROCEDURE

- **Rule 5** procedures govern the hearing
 - Burden of proof on the State
 - Limited only to evidence material to PC
 - May consider evidence which could be suppressed
 - May consider hearsay
Rule 13.5 (c)
- If the Court finds that the aggravating circumstance is legally insufficient or not support by PC, it is dismissed

SPECIAL ISSUES

- (F) 6 *Especially Heinous, Cruel, Depraved*
- (F) 13 *Cold, calculated manner without pretense of moral or legal justification*
- (F) 2 *Previously convicted of a serious offense alleged for crimes that occurred at the same time as the murder*
- Gate keeper function

PRE-TRIAL MOTIONS

- Death penalty motions
- Jury selection motions
- Case specific motions
- The scope of rebuttal in the penalty phase
- The scope of any pre-guilt evaluations of the defendant by a State's expert
Phillips v. Araneta, 208 Ariz. 280, 93, P.3d 480 (2004)
- Exhibits

SETTLEMENT DISCUSSIONS

- A capital trial, the direct appeal, and the post conviction process is a long and costly endeavor with an uncertain end
- Everyone should consider the idea of settlement before trial begins
 - The defendant
 - The next of kin
- Settlement discussion lead by a judicial officer can help everyone

KEEP IN MIND

- The stakes are very high for a capital case for everyone involved
 - *The defendant's life*
 - *The victim's concerns*
 - *The time involved in post verdict proceedings*
- The Standard of practice should be as close to perfect as possible
- Take the time to do it right the first time
